No. 16-1140

IN THE
Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, ET AL.,
Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers.

The Foundation has an interest in this case because it believes that the legislation challenged in this case places an unconstitutional burden on the pro-life speech of crisis pregnancy centers. That speech arises from a belief that human life is a gift of God protected by the commandment "Thou shalt not kill." The Declaration of Independence also recognizes that life is an unalienable right endowed by the Creator, a right that is expressly protected in the Fifth and Fourteenth Amendments.

SUMMARY OF ARGUMENT

Because compulsory speech contrary to a person's beliefs is more offensive than enforced silence, compelled speech is an even more egregious First Amendment violation than prohibited speech.

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[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

Furthermore, a waiting-room sign telling patients where they may obtain abortion information is a highly ideological message and not merely commercial or professional speech. Because there is no comparable requirement that abortion clinics post signs informing patients where and how they may obtain information about abortion alternatives, the mandated notice is both content-based and viewpoint-based. Accordingly, this compelled ideological speech should be subject to strict scrutiny.

Because freedom of speech is expressly protected by the First Amendment while the right to abortion is an extra-constitutional court-created right, any conflict between those rights should be resolved in favor of the enumerated right of freedom of speech.

ARGUMENT

I. Compelled Speech Is an Especially Egregious Violation of the First Amendment.

Suppose, for a moment, that you are a vehement opponent of President Donald Trump. You intensely dislike him personally, you find his style of leadership abhorrent, you consider his "tweets" repulsive, you consider his policies immoral and destructive, and you fervently hope he is not reelected. And you take it for granted that your right to express your opinion about him is protected by the First Amendment.

Suppose, then, that a law is enacted that prohibits you from saying or writing anything critical of President Trump, his style, or his policies, under severe legal penalties for violating this law. You would feel outraged, and rightly so, because your right of freedom of expression has been violated. But you might decide to grit your teeth and remain silent rather than face the penalties.

But suppose, instead, that the law is changed, and now requires you not just to remain silent but to affirmatively say: "I love President Trump, I admire his style, I love his tweets, I hope his policies are enacted, and, above all, I fervently hope he is reelected in 2020." You would then be doubly outraged. You might think: "I might begrudgingly keep my mouth shut about President Trump, but there's no way I'm going to speak his praises. I'll go to jail instead."

Viewed in this light, compelled speech is an even more egregious First Amendment violation than prohibited speech. Forcing someone to say what one does not believe is worse than forcing a person to remain silent, just as forcing someone to contribute to President Trump's campaign is more outrageous than prohibiting donations to his opponent. Appellants argue that "[c]ompelled speech is no more tolerable than compelled silence." Opening Brief, at 23. In fact, however, compelled speech is even less tolerable than compelled silence.[2]

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[2] As a classical example in which compelled speech was considered more egregious than prohibited speech, one is reminded of Sir Thomas More, the Lord High Chancellor of

Appellants have effectively presented the compelled speech argument. The Foundation will not repeat their reasoning but instead calls the Court's attention to a new appeals court decision based on a very similar fact pattern. On January 5, the Fourth Circuit held that a Baltimore ordinance requiring pregnancy clinics that do not offer or refer for abortion to disclose that fact through signs posted in their waiting rooms, violated the First Amendment. *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore,* No. 16-2325, (4th Cir. Jan. 5, 2018)[3].

England, who in 1535 faced death by beheading for refusing to sign the Succession to the Crown Act by which he would acknowledge King Henry VIII as head of the Church of England. More was willing to remain silent, even understanding the legal maxim *qui tacet consentire videtur* ("one who keeps silent seems to consent"), but he would not affirm what he believed to be false. *Thomas More's Trial by Jury: A Procedural and Legal Review with a Collection of Documents* 22 *et seq.* (Henry Ansgar Kelly, Louis W. Karlin, Gerard Wegemer, eds., 2011).

[3] The Fourth Circuit's opinion states that their holding does not conflict with the Ninth Circuit's decision in *Harris,* noting that the California law received a lower level of scrutiny because it applied only to licensed facilities, and that the California law also required unlicensed clinics to post a notice that they were not licensed but that notice did not mention abortion. *Greater Baltimore,* at 20 n.3. Although the Fourth Circuit decision may not be directly relevant to the California notice required of unlicensed clinics, it is most relevant to the notice required of licensed clinics, because both specifically mention abortion.

The Fourth Circuit concluded that the Baltimore ordinance constitutes compelled speech because it "compel[s] a politically and religiously motivated group to convey a message fundamentally at odds with its core beliefs and mission." *Id.* at 5. The Court noted further that an integral component of freedom of expression is "the right not to utter political and philosophical beliefs that the state wishes to have said." *Id.* at 16 (citing *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

> This Court has in the past struck down attempts to compel speech from abortion providers. [*Stuart v. Camnitz*, 114 F.3d 238, 242 (4th Cir. 2014).] And today we do the same with regard to compelling speech from abortion foes. We do so in belief that earnest advocates on all sides of this issue should not be forced by the state into a corner and required essentially to renounce and forswear what they have come as a matter of deepest conviction to believe.

Greater Baltimore, slip op. at 20.

The Fourth Circuit concluded:

> Weaponizing the means of government against ideological foes risks a grave violation of our nation's dearest principles: "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word

> or act their faith therein." *Barnette*, 319 U.S. at 642. It may be too much to hope that despite their disagreement, pro-choice and pro-life advocates can respect each other's dedication and principle. But, at least in this case, as in *Stuart*, it is not too much to ask that they lay down the arms of compelled speech and wield only the tools of persuasion. The First Amendment requires it.

Id. at 20-21.

II. Strict Scrutiny is the Proper Standard of Review for the Compelled Speech in This Case.

Although it recognized that the California law involved content-based discrimination, the Ninth Circuit chose to apply only intermediate scrutiny because it regarded the pregnancy center's communications as commercial or professional speech. But, as this Court's precedents and the Fourth Circuit's recent *Greater Baltimore* decision recognize, the offer and provision of free pregnancy services is neither commercial speech nor professional speech. The notice California requires licensed clinics to post in clear view of their patients telling them where to obtain abortion information is likely to be construed as the pregnancy center's message. That message certainly is not mere commercial or professional speech. Because it tells patients how to obtain information about a medical

procedure the Appellants regard as murder, it is a very serious ideological statement.

The Fourth Circuit stated in *Greater Baltimore* that "commercial speech is 'usually defined as speech that does no more than propose a commercial transaction.'" Slip op. at 9 (quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001)). The Court said further that to determine whether speech is commercial, one must ask "(1) is the speech an advertisement; (2) does the speech refer to a specific product or service; and (3) does the speaker have an economic motivation for the speech." *Greater Baltimore*, slip op. at 10 (quoting *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 285 (4th Cir. 2013) (en banc)).

Answering these questions, the Fourth Circuit noted that the pregnancy center is a non-profit Christian organization that does not charge for its goods or services. *Greater Baltimore*, slip op. at 5, 11. "A morally and religiously motivated offering of free services cannot be described as a bare 'commercial transaction.'" *Id.* at 10. Likewise, Appellants in this case offer free pregnancy services not for commercial gain but because of their sincere moral, ideological, political, and religious convictions. Opening Brief, at 2.

Even if money were involved, that does not necessarily invoke the commercial speech doctrine. A pro-abortion or anti-abortion speech or book is fully protected by the First Amendment. That protection

does not diminish merely because the speaker, author, publisher or bookseller receives financial remuneration. The commercial speech doctrine does not apply to messages that have significant moral, ideological, political, or religious implications.

The Foundation further reiterates its argument that compelled speech is an even more egregious First Amendment violation than prohibitions on speech. For this reason, if there is any doubt as to whether an instance of compelled speech is "pure speech" or commercial/professional speech, that doubt should be resolved in favor of applying strict scrutiny.

III. The FACT Act Discriminates on the Basis of Both Content and Viewpoint.

The Fourth Circuit's *Greater Baltimore* decision recognized that the signs required by the Baltimore ordinance were content-based and viewpoint-based.

> The compelled speech at issue here raises particularly troubling First Amendment concerns. At bottom, the disclaimer portrays abortion as one among a menu of morally equivalent choices. While that may be the City's view, it is not the Center's. The message conveyed is antithetical to the very moral, religious, and ideological reasons the Center exists. Its avowed mission is to "provid[e] alternatives to abortion." ... Its "pro-life

> Christian beliefs permeate all that the Center does."

Greater Baltimore, slip op. at 14-15.

The Fourth Circuit further stated:

> Particularly troubling in this regard is (1) that the ordinance applies solely to speakers who talk about pregnancy-related services but not to speakers on any other topic; and (2) that the ordinance compels speech from pro-life pregnancy centers, but not other pregnancy clinics that offer or refer for abortion.

Id. at 17-18. The court drove home its point: "A speech edict aimed directly at those pregnancy clinics that do not provide or refer for abortions *is neither viewpoint nor content neutral.*" *Id.* at 18 (emphasis added).

The signs required by California constitute much more egregious viewpoint discrimination than those required by Baltimore. The Baltimore signs say that the pregnancy center does not perform or refer for abortion. The California signs require that the pregnancy center affirmatively inform its visitors where they can obtain information about abortion. Such a compulsory statement can easily be understood as facilitating or expressly endorsing abortion.

Further, the mandatory signage requirement applies only to pro-life pregnancy centers. Abortion clinics and pregnancy centers that refer patients for abortions are not required to post signs telling patients where they may obtain pro-life counseling or information about fetal development and alternatives to abortion.

By requiring pro-life clinics to post signs telling patients where to find information about abortion clinics but not requiring abortion clinics to post signs telling patients where to find pro-life alternatives, the State of California has clearly taken sides in the abortion debate. This bias violates the neutrality required of government in the marketplace of ideas. Government has some limited flexibility to advance ideas and policies by what is called "government speech," but it may not advance those policies by prohibiting private speech, much less by compelling individuals to speak in support of the government's position. For example, the State of New Hampshire may adopt "Live Free or Die" as its motto and place that motto on license plates, but the State may not compel individuals to display that motto. *Wooley v. Maynard,* 430 U.S. 705 (1977) (holding that New Hampshire may not prohibit Maynard, a Jehovah's Witness, from covering the motto). Even if California has a compelling interest in informing women of the availability of abortion, it may fulfill that interest in many ways other than compelling pro-lifers to carry the pro-abortion message.

Two weeks before the grant of certiorari in this case, a California trial court enjoined the FACT Act

for violating the state constitution. *Scharpen Foundation, Inc. v. Harris*, No. RIC1514022 (Cal. Sup. Ct. Oct. 30, 2017), https://goo.gl/TQvKmX. The court noted that the state had made almost no effort to disseminate on its own the message that it commanded the crisis pregnancy centers to deliver under penalty of law. *Scharpen*, slip op. at 6-7. In fact, the Act requires no one except licensed pro-life pregnancy centers to display the pro-abortion message. Thus, one could reasonably surmise that the purpose of the legislation was not so much to deliver the state's message as to occlude and obstruct the pro-life message of the pregnancy centers. By enacting such one-sided legislation, California has demonstrated a clear animus against crisis pregnancy centers and persons of pro-life persuasion.

IV. Weighing the Right to Abortion Against the Right to Freedom of Speech

Although this case primarily addresses compelled speech about abortion and not this Court's abortion jurisprudence per se, the Foundation notes that the Ninth Circuit relied on the abortion decisions to justify its holding that the mandatory notice provision satisfied intermediate scrutiny. "California has a substantial interest in the health of its citizens, including ensuring that its citizens have access to and adequate information about *constitutionally-protected medical services like abortion*." *NIFLA v. Harris*, 839 F.3d 823, 841 (9th Cir. 2016) (emphasis added). Further, in justifying its holding that the statute was narrowly tailored, the Ninth Circuit explained that "many of the choices facing pregnant

women are time-sensitive, such as a woman's right to have an abortion before viability." *Id.* at 842 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992)).

Thus, the relative weight of the abortion right when counterposed against the First Amendment right of freedom of speech is relevant to this Court's decision.

A. The Abortion "Liberty" Rests on Weak Legal Ground.

Because the purpose of the Fourteenth Amendment is to extend personhood to those previously considered non-persons, it cannot logically be construed to provide for the mass destruction of innocent human life. A central purpose of the Civil War amendments was to forbid any state from treating a human being as property that could be disposed of at the will of its owner. U.S. Const. amends. XIII-XV. Yet legalized abortion, supposedly a Fourteenth Amendment "liberty," treats unborn human life as disposable property. *See Casey*, 505 U.S. at 869 (stating that "implicit in the meaning of liberty" is a "woman's right to terminate her pregnancy before viability"). That the Civil War Amendments were ratified to authorize the slaughter of an entire class of innocent human beings is absurd. One scholar notes the contradiction in "insist[ing] that the Fourteenth Amendment, written to secure the fundamental rights of human nature to all persons, prohibited states from protecting one class of human beings from the private use of lethal force."

Justin Buckley Dyer, *Slavery, Abortion, and the Politics of Constitutional Meaning* 69-70 (2013). The concept that the "realm of personal liberty which the government may not enter," *Casey*, 505 U.S. at 847, includes the place where a hired doctor destroys an unborn child is equally ridiculous.

Furthermore, the Court should be aware that recent scholarship indicates that the abortion liberty declared in *Roe v. Wade*, 410 U.S. 113 (1973), was based upon a falsified history. Two premises of *Roe* were that abortion had historically been a common-law liberty and that the primary purpose of laws adopted in the mid-nineteenth century outlawing abortion was to protect the mother's health, not the child that she carried. Both were false. *See* Dyer, *supra*, at 105-132 (exposing the dishonest history that the Court relied upon to justify creation of the abortion right).

B. The Enumerated Right of Freedom of Speech Should Take Priority Over the Unenumerated Right to Abortion.

In contrast to the dubious abortion "liberty," the First Amendment expressly states that "Congress shall make no law ... abridging the freedom of speech." "[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). Thus, as a

Fourteenth Amendment limitation on state action,[4] the First Amendment inherently carries more weight than the conjured right to abortion. "It is one thing for the Court ... to invalidate legislation found to be in clear violation of an explicit constitutional command; it is quite another for the Court to claim the authority to invalidate legislation based on rights not mentioned in the Constitution." David Smolin, *Fourteenth Amendment Unenumerated Rights Jurisprudence: An Essay in Response to* Stenberg v. Carhart, 24 Harv. J. L. & Pub. Pol'y 815, 817 (2001).

V. The Spiritual Root of the Attack on Pro-Life Pregnancy Centers

The California law implicitly equates abortion with child birth as a health service. But giving life to a child is a qualitatively different act than killing a child.

The abortion industry is a money-making enterprise. Planned Parenthood, the behemoth of the industry,[5] sets abortion quotas for its affiliates[6] and,

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[4] Rep. John Bingham (R-OH), the drafter of the relevant portion of the Fourteenth Amendment, stated that "the privileges or immunities of citizens of the United States" referenced in the amendment included "the personal rights guarantied and secured by the first eight amendments of the Constitution." *Cong. Globe*, 39th Cong.,1st Sess. 2765 (1866).

[5] "Planned Parenthood has become an abortion behemoth, the nation's largest abortion chain ....", Randall K. O'Bannon, *40 Years: Planned Parenthood Becomes Abortion Empire*, Nat'l Right to Life News (Winter 2013), https://goo.gl/Ro5vpt.

[6] "Every center had a goal for how many abortions they would do ... needed to do." Alliance Defending Freedom, *Does*

to augment its bottom line, apparently traffics in the organs of the babies it kills.[7] Crisis pregnancy centers are anathema to the abortion industry not only because they impact the bottom line by diverting customers away from the suction-machine solution, but also because their very existence constitutes a godly rebuke to the evil performed in the name of "women's rights."

As abortion has continued with constitutional protection, millions of women have engaged in the practice, in part because the exercise of a constitutional right has always been deemed a privilege of American citizenship. Although the Constitution does not mention abortion, many trust that what the law protects is also moral, only to awaken after the experience to a lifetime of remorse,

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Planned Parenthood Have Abortion Quotas? (Jan. 17, 2014) (interview of former clinic manager Sue Thayer), https://goo.gl/zzV639; "We were told on a regular basis: 'You have a quota to meet to keep this clinic open.'" Live Action, *Planned Parenthood's Abortion Quotas* (Feb. 16, 2017) (interview of former Planned Parenthood nurse, Marianne Anderson), https://goo.gl/CqVy3F. *See* Bradford Richardson, *Planned Parenthood Sets 'Abortion Quotas,' Former Employees Say*, Washington Times (Feb. 7, 2017), https://goo.gl/xgfJ4c.

[7] *See Human Fetal Tissue Research: Context and Controversy*, S. Doc. No. 114-27, at 35 (2016) (detailing that a tissue-procurement middleman, who paid Planned Parenthood $60 for an aborted baby, separately resold the brain, eyes, liver, thymus, and lungs for over $2,000); *Final Report of the House Select Investigative Panel of the Energy & Commerce Committee*, at 297-352 ("Case Studies of the Fetal Tissue Industry – Planned Parenthood"), 352-60 ("Changing the Method of Abortion Procedure to Obtain More Fetal Tissue") (Dec. 2016), https://goo.gl/BbZcbT.

shame, and horror as their maternal nature recoils at the crime committed against their own posterity.[8]

To evade this emotional nightmare, many seek to justify the deed by becoming ardent supporters of the practice.[9] Thus, "most who defend the underlying practice become self-righteous, overly defensive, or clinically detached from the underlying brutality ...." Smolin, *supra*, at 838. *See* Erin Lawson, *Yesterday I Had an Abortion*, Elephant Journal (Feb. 8, 2017), https://goo.gl/rUpP4f (stating that "I have not learned to be ashamed of my choice. On the contrary, my choice has empowered me ....").[10] Ms. Lawson is

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[8] *See, e.g.*, Priscilla K. Coleman, et al., *Women Who Suffered Emotionally from Abortion: A Qualitative Synthesis of Their Experiences*, 22 J. Amer. Physicians & Surgeons (Winter 2017); Elizabeth Ring-Cassidy & Ian Gentles, *Women's Health After Abortion: The Medical and Psychological Evidence* (2003); Theresa Burke, *Forbidden Grief: the Unspoken Pain of Abortion* (2002); Bill & Sue Banks, *Ministering to Abortion's Aftermath* (1982).

[9] Cecile Richards had an abortion before becoming President of Planned Parenthood. *See* Cecile Richards, *Ending the Silence That Fuels Abortion Stigma*, Elle (Oct. 16, 2014), https://goo.gl/xb7K18. Jane Bovard, who managed the first abortion facility in Fargo and later opened her own, aborted her fifth child in 1974. Robin Huebner, *Abortion protesters, proponents reflect on decades of Fargo clinic struggles as nation marks 40 years of* Roe v. Wade, The Forum (Jan. 20, 2013).

[10] On the other hand, some women who have been deeply involved in abortion have later become ardent pro-lifers. Norma McCorvey, the "Jane Roe" of *Roe v. Wade*, repented of being the face of the abortion industry and became ardently pro-life. Her encounter with the almost aborted seven-year-old daughter of a pro-lifer that befriended her changed her heart. "I was forever changed by this experience," she wrote. "Abortion was no longer an 'abstract right.' It had a face now, in a little girl named

entitled to be proud of her choice. But she is not entitled to force pro-life crisis pregnancy centers to echo her choice with state-compelled messages, which is exactly what California seeks to do here.

CONCLUSION

The State of California has deliberately targeted pro-life crisis pregnancy centers by compelling them to display a highly ideological message informing their patients where to obtain information about an operation that they consider to be murder. Because this compelled ideological speech is neither content-neutral nor view-point neutral, it must be accorded strict scrutiny.

By upholding the FACT Act, the Ninth Circuit has elevated the alleged right to abortion above the constitutionally enumerated First Amendment right of freedom of speech.

Accordingly, the judgment of the Ninth Circuit should be reversed.

Emily." Norma McCorvey with Gary Thomas, *Roe v. McCorvey*, http://www.leaderu.com/common/roev.html.

Respectfully submitted,

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